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No. 89-1223

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,
v.
SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY, BP OIL SHIPPING COMPANY, USA, AND AMERICAN PETROFINA, INCORPORATED

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QUESTIONS PRESENTED

1. Did the court of appeals correctly construe appropriations legislation when it held that, under the plain meaning rule, the statute applied prospectively only and did not invalidate a rule promulgated by the Maritime Administration ("MarAd") weeks before the enactment of the legislation in question?

2. Did the court of appeals correctly hold that the rule in question was not "arbitrary or capricious," where MarAd had fully explained the rule's basis and purpose, the ways in which it promoted the objectives of the Merchant Marine Act, 1936, 46 U.S.C. app. § 1101, *et seq.*, and the reasons why it adopted the rule in preference to proffered alternatives?

PARTIES TO THE PROCEEDING

The parties are correctly identified in the petition for a writ of *certiorari* (page ii), except that the corporate name of SPC Shipping Inc., an appellant in the court of appeals and a respondent here, has been changed to BP Oil Shipping Company, USA.

Pursuant to Rule 29.1, and consistent with their understanding of the purposes of the Rule, respondents set forth those parents and subsidiaries of respondents with outstanding securities that are in the hands of the public:

Atlantic Richfield Company

Agro Internacional, S. de R.L. de C.V.
Alyeska Pipeline Service Company
Arco Chemical Company
Badger Pipe Line Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Kuparuk Transportation Capital Corporation
Logan Aluminum Inc.
Lyondell Petrochemical Company
Nihon Oxirane Company, Ltd.
Platte Pipe Line Company
Showa Arco Solar Far East PTE LDD
Showa Arco Solar KK
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

BP Oil Shipping Company, USA

Anadromous, Inc.
BP America Inc.
BP Australia Holdings Limited
BP Canada Inc.
BP Capital BV
BP Developments Australia Limited
BP Exploration (Alaska) Inc.
BP Finance Australia Limited
BP France
BP North American Finance Corporation Inc.
BP Oil Company
BP Oil Distribution Limited
BP Overzee BV
BP Pipelines (Alaska) Inc.
The British Petroleum Company p.l.c.
Britoil p.l.c.
Hope Brook Gold Inc.
Lear Petroleum Corporation
Old Ben Coal Company
Service Station Holdings Inc.
The Standard Oil Company
Truckstops Corporation of America
Western Ground Rents Limited

American Petrofina, Incorporated

American Petrofina, Incorporated is majority owned, through a series of affiliated holding companies, by Petrofina S.A., a Belgian company whose stock is not publicly traded in the United States.

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BRIEF IN OPPOSITION FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY, BP OIL SHIPPING COMPANY, USA, AND AMERICAN PETROFINA, INCORPORATED

Respondents Atlantic Richfield Company, BP Oil Shipping Company, USA, and American Petrofina, Incorporated respectfully request that this Court deny the petition for a writ of *certiorari* filed by petitioners Independent U.S. Tanker Owners Committee, *et al.*, seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT OF THE CASE

This case concerns the lawfulness of a rule promulgated by the Maritime Administration ("MarAd") pursuant to its authority under the Merchant Marine Act, 1936 (the

"Act"), 46 U.S.C. app. § 1101, *et seq.* To promote the development of a strong, competitive merchant marine, *see* 46 U.S.C. app. § 1101, Title V of the Act, 46 U.S.C. app. §§ 1151-1161, authorizes the Secretary of Transportation to pay a construction-differential subsidy ("CDS") of up to half of the cost of constructing a ship in the United States for operation in the foreign trade. By lowering the effective cost of American ship construction, CDS is intended to permit American-built vessels to compete successfully in the foreign trade with vessels built abroad.

Because CDS-built vessels have a capital-cost advantage over vessels built at unsubsidized domestic cost, Section 506 of the Act, 46 U.S.C. app. § 1156, requires the owner of a CDS-built vessel, as a condition of receiving the subsidy, to agree not to operate the vessel domestically. Under Section 506, the Secretary may waive this contractual restriction for periods not exceeding six months per year in exchange for repayment of a *pro rata* portion of the CDS paid for the vessel's construction. From 1977 through 1984, MarAd granted 43 such temporary waivers. These requests for waiver were prompted, as MarAd found, Pet. App. 52a-53a, by the collapse of opportunities for CDS vessels in the world tanker market, and by the simultaneous increased demand for such vessels to transport Alaska North Slope crude oil in the domestic trade. Virtually all of these waivers went to Very Large Crude Carriers ("VLCCs"), which MarAd considers the most suitable ships to transport crude oil from Alaska to Panama, for transshipment through the Canal to East and Gulf Coast ports.

In *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980), this Court unanimously held that MarAd has authority under the Act to cancel a subsidized vessel's domestic trading restrictions, and permit it to enter the domestic trade on a *permanent* basis, on repayment of

the entire unamortized portion of its CDS with interest.[1] Since 1980, MarAd has three times proposed a CDS payback rule pursuant to the authority reaffirmed in *Seatrain*. Each time, the proposed rule has been subject to rigorous judicial scrutiny in the Court of Appeals for the District of Columbia Circuit to assure conformity with the Merchant Marine Act, 1936, and the Administrative Procedure Act ("APA").

First, in 1980, MarAd adopted a rule establishing criteria for granting requests for a permanent revocation of domestic trading restrictions. 45 Fed. Reg. 68,393 (1980). Pursuant to this rule, MarAd approved CDS repayment by a VLCC, the BAY RIDGE. In *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 917 (D.C. Cir. 1982), while reaffirming MarAd's authority to adopt such a rule, the court of appeals vacated the rule, largely on the procedural ground that the rule lacked a general statement of its basis and purpose.

Then, in 1985, the Secretary adopted a different CDS payback rule, establishing a one-year period within which any CDS-built tanker could repay unamortized CDS, with interest, in exchange for revocation of its domestic trading restrictions. Pursuant to the 1985 rule, the owners of the ARCO INDEPENDENCE, the ARCO SPIRIT, and the BROOKLYN repaid CDS, and the vessels have since been entitled to operate in the Alaska trade. However, in *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987) (*"ITOC II"*), the court of appeals again set the

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[1] The Court reasoned that such permanent entry is preferable to the temporary waivers expressly available under Section 506 since permanent entry does not pose the danger of a "supercompetitor" moving back and forth between the domestic and foreign trades and "skimming the cream" from both markets. *Id.* at 589. Rather, it simply allows "a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade." *Id.* at 590.

rule aside, on the ground that the Secretary's statement of basis and purpose was inadequate. The court of appeals required that the Secretary provide a fuller explanation of how the rule advanced the purposes of the Act and why alternatives were inadequate.[2]

Thereafter, on April 10, 1987, MarAd addressed the shortcomings identified in *ITOC II* and proposed a third rule (the "1987 rule," at issue here) reaffirming that the four VLCCs that had fully repaid CDS since *Seatrain*—the ARCO SPIRIT, the ARCO INDEPENDENCE, the BROOKLYN, and the BAY RIDGE—were released from restrictions on domestic operations. Pet. App. 59a. On June 19, 1987, after considering comments on the proposed rule, MarAd promulgated the final rule. Pet. App. 49a. In order to avoid the enormous disruption to domestic commerce that would have occurred had the court of appeals' mandate issued before the 1987 rule became effective, *see* note 2 *supra*, MarAd made the rule effective immediately on publication on June 22, 1987. Pet. App. 104a-105a.

While MarAd was conducting these rulemaking proceedings, however, petitioners were lobbying Congress to add a rider to an appropriations bill to derail the adoption of the rule. Legislation that would have barred promulgation of the rule was adopted in the House of Representatives, but defeated in the Senate, and legislation was not enacted before promulgation of the 1987 rule. On July 11, 1987, fully 19 days *after* the 1987 rule took effect, compromise appropriations legislation containing, as Section 505, the forward-looking language of the House bill was signed into law: "[n]one of the funds

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[2] The *ITOC II* court withheld its mandate for six months, until July 16, 1987, "to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade," and "to avoid further disruptions in the domestic market." 809 F.2d at 855.

appropriated . . . *shall be* used . . . to propose, promulgate, or implement any rule or regulation" relating to CDS repayment.[3]

On review commenced by the present petitioners, the district court set the rule aside on grounds (1) that Section 505 operated to invalidate the rule, and (2) that the rule was inconsistent with the objectives of the Act, not supported by record evidence, and thus arbitrary and capricious.[4]

On appeal, the court of appeals reversed. The court of appeals held that: (1) By its plain terms, Section 505 operated prospectively only and could not be read to invalidate a rule promulgated weeks before its passage; accordingly, no review of at-best ambiguous legislative history was necessary. Pet. App. 17a-20a. Moreover, and contrary to the district court's view, MarAd was not required to stay its hand merely because congressional committees were considering an appropriations bar, especially since one House of Congress had expressly disapproved such a provision at the time MarAd promulgated the 1987 rule. *Id.* at 16a-17a. (2) The 1987 rule was fully consistent with the purposes of the Act and was supported by the record, and MarAd had appropriately considered available alternatives before adopting the 1987 rule, as required by the court of appeals in *ITOC II*.[5]

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[3] Pub. L. No. 100-71, 101 Stat. 391, 471 (1987) (emphasis added).

[4] The district court also ruled that MarAd had not complied with the 30-day notice requirement under the APA, 5 U.S.C. § 553 (d)(3). Pet. App. 42a-45a. That ground, also reversed by the court of appeals, is not pressed in the petition for writ of *certiorari*.

[5] Pet. App. 10a-16a. The Court should be aware that on February 7, 1990, only one week after filing the petition for *certiorari*, one of the petitioners, Overseas Shipholding Group, Inc., filed in the court of appeals a motion to recall and modify the mandate. Respondents oppose the motion, which is *sub judice*, as without merit.

REASONS FOR DENYING THE WRIT

Petitioners have not identified any of the reasons specified in Rule 10 of the Court's Rules that would support review on *certiorari*. In fact, the petition presents ordinary and unexceptional questions of statutory construction and review of agency action that are undeserving of further review. The court of appeals applied well-settled precedent to those questions and reached a result that is indisputably correct.

I. FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION SUPPORT THE HOLDING OF THE COURT OF APPEALS THAT SECTION 505 APPLIES PROSPECTIVELY ONLY, AND THAT DECISION DOES NOT WARRANT REVIEW BY THIS COURT.

Contrary to petitioners' contention, this case poses no question as to "whether courts and executive agencies must give effect to Congress' substantive policy choices expressed in appropriations legislation." Pet. 13. Respondents have never disputed that appropriations legislation, like all other statutes, must be given effect, and the court of appeals did so here. But petitioners beg the questions *what* effect appropriations legislation like Section 505 must be given, and *what* "Congress' substantive policy choices" may have been.

As respondents show below, by faithfully applying long-settled, basic principles of statutory construction and this Court's unambiguous precedents, the court of appeals correctly held that Section 505, which Congress passed and the President signed after MarAd had promulgated its rule, must be given prospective effect only and did not operate retroactively to invalidate the 1987 rule. Review of that decision is clearly unwarranted.

A. The Plain Language of Section 505 Demonstrates That the Statute Does Not Invalidate the 1987 Rule.

At bottom, petitioners' argument rests on the unfounded notion that courts need not heed the plain, unambiguous language of statutes. Indeed, petitioners belittle the court of appeals for its adherence to "the literal form of the act." Pet. 11. Beyond dispute, however, the first rule of statutory construction is that "'[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.'"[6]

As the court of appeals correctly concluded, the language of Section 505 is plain on its face and is not "susceptible to an alternative construction." Pet. App. 19a. Section 505 provides that "[n]one of the funds appropriated . . . *shall be* used . . . to propose, promulgate, or implement any rule or regulation" relating to full CDS repayment.[7] That language is unambiguously forward-looking. Indeed, elementary rules of statutory construction make clear that the use of the word "shall" means that the statute is to operate prospectively only.[8]

This construction is further confirmed by the long-standing rule against the retroactive application of legis-

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[6] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.01, at 73 (Sands 4th ed. 1984) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Petitioners' obvious dislike for the statute's "literal" meaning is an abrupt about-face from the position they asserted in the court of appeals. In the court below, they correctly described the same plain meaning rule that they now disdain as a "basic principle of statutory construction." Joint Brief for Appellees at 16, *Independent U.S. Tanker Owners Committee v. Skinner*, 884 F.2d 587 (D.C. Cir. 1989).

[7] Pub. L. No. 100-71, 101 Stat. 391, 471 (1987) (emphasis added).

[8] *See* 1A SUTHERLAND STATUTORY CONSTRUCTION 692-93 (Sands 4th ed. 1985) ("[i]t is obvious that the word 'shall,' in itself, cannot 'include' the past").

lation. As this Court held long ago, "legislation must be considered as addressed to the future, not to the past." [9] Under this Court's decisions, quoted and followed below, *see* Pet. App. 18a, "retrospective operation will not be given to a statute . . . unless such be 'the unequivocal and inflexible import of [its] terms. . . .' " [10] This rule has special force where, as here, restrictions on expenditures of appropriated funds are concerned,[11] since once money has been spent, it cannot be "unspent."

Petitioners err when they urge that the statute, when limited to its "literal" meaning, has no effect. To the

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[9] *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *see also Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988); *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982).

[10] *Greene v. United States*, 376 U.S. 149, 160 (1964) (quoting *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). Thus, Congress may expressly provide for a statute to operate retrospectively, as in *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), a case that petitioners erroneously label "dispositive." Pet. 12 n.7. Congress in no event made Section 505 expressly retroactive.

In contrast to the situation in *Sperry*, moreover, applying Section 505 retroactively here would violate the due process clause because it would have "an extremely narrow focus" and would be aimed at a specific, identifiable economic group—the vessels that have repaid CDS. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 248 (1978); *see Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983). Avoidance of this constitutional issue—and avoidance of the separation of powers problem, also pointed out to the court below, *see* Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1377-79 (1980)—further supports the statutory construction of the court of appeals.

[11] *TVA v. Hill*, 437 U.S. 153, 190-91 (1978). Congress' own Government Accounting Office has specifically stated that "[appropriations s]tatutes and amendments to statutes are construed to apply prospectively only (that is, from the date of enactment or other effective date if one is specified) . . . ." GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-48 (1st ed. 1982).

contrary, the court of appeals correctly ruled that, read prospectively, the plain words of the statute have abundant meaning. Pet. App. 19a-20a. The 1987 rule extends to only four vessels, although there were numerous subsidized tankers (and non-tankers) that might have repaid CDS under a more expansive CDS payback rule. *See* 48 Fed. Reg. 4408, 4409-10 (1983). Thus, as the court of appeals noted, "section 505 could well have been intended to guard against the possibility that the Department might change its mind and enter into repayment arrangements with additional CDS vessels." Pet. App. 19a-20a.[12]

Petitioners also err in claiming that Section 505 precluded the affected vessels from operating in the domestic trade because "further agency expenditure was needed to implement the rule." Pet. 11 n.6. To the contrary, MarAd was not required to do anything at all to implement the rule. Contrary to petitioners' assertion, *id.*, Section 506 of the Act, 46 U.S.C. app. § 1118, says nothing about written CDS contract amendments; no such amendments were necessary here.[13] MarAd could, and did, simply decide unilaterally not to enforce the domestic trading restrictions in the original CDS contracts,

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[12] Likewise, the statute's reference to the vessels that had repaid CDS pursuant to the 1985 CDS payback rule has meaning when applied prospectively. If the reviewing courts had set the rule aside on any procedural or other ground curable by MarAd, then Section 505, during the period of its effectiveness, would likely have prevented the agency from taking steps to re-promulgate the rule following a court remand.

[13] Even though they were not required to do so, when the vessel owners repaid CDS on the BROOKLYN, the ARCO SPIRIT, and the ARCO INDEPENDENCE in 1985 and 1986, they entered into written contract modifications with the United States. These modifications acknowledged the repayments and deleted the domestic trading restrictions, citing "46 C.F.R. § 276.3," the CDS payback rule as codified. Because the 1987 rule simply substituted for the previous codification of the same 46 C.F.R. § 276.3, no further contract modifications would have been needed in any event.

in exchange for full CDS repayment. As the court of appeals correctly held, "because payment from the three VLCCs has already been received and because the tankers have operated domestically since 1985, the rule affirms the right of the ARCO INDEPENDENCE, ARCO SPIRIT, and BROOKLYN to remain in domestic commerce, and their contracts need not be amended to confirm this right." Pet. App. 20a.

B. Even Assuming That Resort to Legislative History Were Appropriate, the Legislative History Makes Clear That the Statute Was Intended To Apply Prospectively Only.

Because it found that there was "no ambiguity to be resolved," Pet. App. 20a, the court of appeals was also correct in refusing to base its decision on the statute's legislative history. As this Court has repeatedly made clear, "'[r]esort to legislative history is only justified where the face of the Act is inescapably ambiguous . . . .'" [14] But even if examination of legislative history were appropriate here, the legislative history shows that the statute was meant to apply prospectively only.[15]

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[14] *Garcia v. United States*, 469 U.S. 70, 76 n.2 (1984) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *see also United States v. Locke*, 471 U.S. 84, 95-96 (1985).

[15] In fact, the court of appeals did examine the legislative history to support its conclusion that the statute operated prospectively only. The court of appeals noted that even those legislators who believed that Section 505 operated to preclude the affected vessels from the domestic trade appear to have assumed that the legislation would do so prospectively because (they thought) MarAd had yet to take steps to implement the 1987 rule. Pet. App. 19a (citing 133 Cong. Rec. S9142 (daily ed. July 1, 1987) (remarks of Sen. Hollings); 133 Cong. Rec. H2792 (daily ed. July 8, 1987) (remarks

To the extent that the legislative intent behind Section 505 can be divined at all,[16] it makes clear that Section 505 was a compromise. A provision containing the same forward-looking language that was ultimately enacted was originally considered and adopted by the House before the 1987 rule was promulgated.[17] The Administration objected to the measure because, *inter alia*, it would require the Treasury to refund more than $100 million in repaid CDS to the vessel owners;[18] and the Senate Committee on Appropriations deleted the entire section and reported a bill without it on May 1, 1987.[19] Before the House-Senate conference began the process of reconciling the two bills, MarAd promulgated the 1987 rule in final form with an immediate effective date. As the court of appeals correctly observed, at that point "it was by no means clear that the final version of the appropriations bill would contain section 505 because the Senate had already been persuaded to drop the section from its version of the Supplemental Appropriations Act." Pet. App. 16a.

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of Rep. Carr); 133 Cong. Rec. S10,866 (daily ed. July 29, 1987) (remarks of Sen. Mikulski)). But, as the court of appeals properly concluded, Pet. App. 19a, and as we have shown in Part I.A. *supra*, those legislators were clearly mistaken in that view.

[16] As one commentator—upon whom petitioners themselves rely, *see* Pet. 13—has noted, the legislative intent behind appropriations riders (if any such "intent" even exists) is particularly difficult to discern and is not very meaningful in construing statutes. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 457-58.

[17] *See* H.R. REP. No. 28, 100th Cong., 1st Sess. 120-21, 145 (1987). (The provision was Section 506 of the House bill.)

[18] *See "Statement of Administration Policy"* (Apr. 15, 1987), *contained in* Appendix A: "Administrative and Legislative Materials Relating to this Matter," Item 15 (filed in the district court Feb. 17, 1988).

[19] *See* S. REP. No. 48, 100th Cong., 1st Sess. 164 (1987).

Only after MarAd had promulgated and fully implemented the 1987 rule did the conference even consider (and then restore) the House language. But the promulgation of the rule dramatically altered the terms of the legislative debate, because Section 505, as prospectively written, no longer operated on the already-promulgated 1987 rule. Legislative proponents of permanent CDS payback could now support the language in the conference bill since, on its face, it would allow existing CDS payments to stand and would only prohibit additional repayments in the future. The language of the conference report mirrored the forward-looking language of the original House report: "The House language restored by the conference agreement prohibits . . . the Maritime Administration from using funds . . . to propose, promulgate or implement any [CDS payback] rule or regulation . . . ."[20] There is no evidence in the conference report that Congress harbored any intent to alter the forward-looking nature of the provision.[21]

Finally, the President's signing statement—which goes unmentioned in the petition for *certiorari*—confirms the purely prospective nature of Section 505:

> I have signed this bill into law based on the understanding that *because this restriction on their authority is not retroactive, it will have no effect on vessel owners who previously repaid their subsidies pursuant to a CDS repayment rule published in the Federal Register on June 22, 1987. Instead, this provision of section 505 will affect only further repay-*

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[20] H.R. CONF. REP. No. 195, 100th Cong., 1st Sess. 112 (1987). *Compare* H.R. REP. No. 28, 100th Cong., 1st Sess. 120-21, 145 (1987).

[21] Thus, as a member of the conference observed, "the deliberations and actions of the conference committee indicate that section 505 was intended to be prospective in nature." 133 Cong. Rec. E3170 (daily ed. July 30, 1987) (remarks of Rep. Regula).

> *ments by vessel owners.* Were it otherwise, a restriction on rulemaking in this area would cost the taxpayers more than $100 million in payments to vessel owners who have previously repaid their subsidies.[22]

In short, the legislative history fully supports the court of appeals' ruling that the plain words of Section 505 are to be given prospective effect only.

C. The Decision Below Does Not in Any Way Undercut Congressional Ability To Enact Substantive Legislation Through Appropriations Bills.

In an effort to transform this aspect of the case into something other than what it is—a garden-variety dispute over the plain meaning of a statute—petitioners reach out to complain that the court of appeals' decision will somehow impede congressional efforts to enact measures by means of the appropriations process. Pet. 13-14. Petitioners appear to be asking the Court to articulate different rules of construction for appropriations statutes than for other statutes. Thus, according to petitioners, and in marked contrast to the rules for construing other statutes, appropriations measures like Section 505 should not be read "literally"; rather, they should be applied retroactively despite their plain meaning.

First of all, petitioners have made no effort to show—nor could they show—that different rules of construction are called for.[23] There is plainly no reason to create any

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[22] Statement of the President Upon Signing H.R. 1827, 23 WEEKLY COMP. PRES. DOC. 800 (July 20, 1987) (emphasis added). This Court has in the past recognized the significance of presidential signing statements for interpreting statutes. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986).

[23] They have not shown, for example, that the federal courts have had any difficulty applying appropriations statutes. Indeed, the Court of Appeals for the District of Columbia Circuit has demonstrated that it is willing to construe appropriations statutes to invalidate agency action whenever the plain statutory language supports that result. *See National Treasury Employees Union v. Devine*, 733 F.2d

special rules of construction for appropriations measures. To the contrary, the very authority relied on by petitioners cogently points out the serious problems raised when Congress uses appropriations bills to enact substantive legislation, explaining that "the appropriations process may not be conducive to sound substantive policymaking" because "appropriations are often acted on quickly, providing little opportunity for thoughtful deliberation of the issues raised by such measures." [24]

Moreover, while petitioners are surely correct that appropriations legislation may sometimes be useful to address problems of an emergency nature, Pet. 13, there was manifestly no emergency here. The 1987 rule did not change the *status quo* in any respect; three of the VLCCs in question had been in the domestic trade since 1985, and the fourth had been operating there since 1980.[25] Petitioners note that "[f]or over a decade . . . Congress . . . struggled with the authority and standards under which the Secretary may accept repayment of construction-differential subsidy." Pet. 6. If so, then as the court of appeals observed, Pet. App. 21a, Congress had ample time before, during, and after passage of Section 505—had it really wished to do so—to enact substantive legislation that might have extended to the CDS vessels at issue here.[26] It did not do so in the appropriations legislation before this Court.

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114 (D.C. Cir. 1984). The court of appeals explained at length why *Devine* is wholly distinguishable. *See* Pet. App. 16a-17a.

[24] *See* Devins, *supra* note 16, at 457, 458 (footnote omitted). It is for this reason that the House and Senate rules prohibit the inclusion of substantive riders in appropriations bills. *See* House Rule XXI, ¶¶ 2, 5; Senate Rule XVI, ¶¶ 2, 4.

[25] Thus, contrary to petitioners' view, Section 505 did not "block any transfer of tonnage." Pet. 10. As the uncontested statement of the facts in the decision below makes clear, Pet. App. 5a-6a, the "transfer of tonnage" had already long since occurred.

[26] *See* 133 Cong. Rec. E3170 (daily ed. July 30, 1987) (remarks of Rep. Regula) (noting that the conferees "could have altered that

II. THE COURT OF APPEALS' DECISION NOT TO SECOND-GUESS THE AGENCY'S DETERMINATION ON A MATTER CLEARLY COMMITTED TO AGENCY DISCRETION WAS CORRECT AND PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW.

The court of appeals' holding that the 1987 rule was not arbitrary and capricious was correct and fully in accord with this Court's precedents.[27] The court of appeals properly rejected petitioners' argument that, instead of allowing the affected VLCCs to pay back CDS and enter the domestic trade, MarAd had no choice but to pay huge operating subsidies—in excess of $20 million annually ($5 million per vessel, *see* Pet. App. at 76a)—that would be necessary to enable those vessels to operate competitively in the foreign trade. That holding presents no important question of law meriting this Court's review.

Petitioners' claims about operating subsidy are seriously flawed. Petitioners now argue that the court of appeals erred because the statute authorizing operating subsidies, 46 U.S.C. app. § 1171(a), is "mandatory." Pet. 18. Petitioners further contend that in determining whether operating subsidies were preferable to CDS payback, MarAd was prohibited from giving any weight to the factors it considered in rejecting operating subsidies as an alternative.[28]

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section so as to specifically abrogate the final rule," but that "[t]hey made no formal attempt to do so . . . ."). Of course, overturning the rule would require the government to refund the approximately $100 million in subsidies that had been repaid under the rule, as the President noted. *See* page 13 *supra*.

[27] *See Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[28] In rejecting the operating subsidy alternative, MarAd pointed to the "exorbitant" cost to the United States, "sound policy," the reduction of incentives for efficient vessel operation, and the coun-

First, even if supportable, petitioners' contention about operating subsidies would not undermine MarAd's conclusions about the soundness of the 1987 rule. Petitioners here focus on an extraordinarily small aspect of the policy and evidentiary issues addressed by the agency. When MarAd promulgated the 1987 rule, its statement of basis and purpose first explained how the rule would foster a "well-balanced fleet" by making vessels that were "most suitable" for the Alaska-Panama route available for that purpose. Pet. App. 69a-72a. The court of appeals found that these agency conclusions were well supported in the record. Pet. App. 11a-12a. MarAd then explained at length how the rule would promote the objectives other than "suitab[ility]" set out in Section 101 of the Act. Pet. App. 72a-86a, 95a-99a. MarAd concluded that the rule would enhance the domestic fleet, and would have no negative effect on any of the other objectives, save employment of seamen. MarAd concluded that there would be no negative impact on the foreign fleet because, if the CDS vessels in question could not operate in the domestic trade, they would be laid up or scrapped. Pet. App. 74a-81a. Thus, the appropriateness *vel non* of operating subsidies goes only to the foreign-fleet aspect of the issue before MarAd.

Second, the notion that the availability of operating subsidy must always be the answer to the problems that the affected VLCCs encounter in the foreign trade proves far too much. Indeed, it is inconsistent with the very premise of this Court's decision in *Seatrain*, which confirmed the Secretary's authority under the Act "to approve full-repayment/permanent-release transactions." 444 U.S. at 597. For the VLCC STUYVESANT in *Seatrain*, as in the case of every VLCC CDS repayment, the

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terproductive effect on United States efforts to remove anticompetitive trade practices by other governments that would flow from such massive open-ended subsidies. Pet. 18 (citing Pet. App. 76a).

provision of operating subsidies to promote the foreign trade was a theoretically available alternative. But *Seatrain* means that MarAd is free to reject that alternative and to prefer permanent CDS payback. Adoption of petitioners' argument would consign to the dustheap both the holding of *Seatrain* and the important authority it reaffirms.

Third, petitioners' claim that MarAd had an obligation to consider operating subsidies as an alternative to the 1987 CDS payback rule rests on a false premise. Petitioners assert that such an alternative should have been adopted in order to avoid "the destructive consequences to the coastwise fleet of the [VLCCs'] displacement into the domestic trade . . . ." Pet. 17-18. MarAd, of course, found that the effects of the rule on the domestic fleet as a whole would be very positive. Pet.App. 81a-84a. The "destructive consequences" of which petitioners complain are nothing more than the possible results of head-to-head competition between the VLCCs affected by the 1987 rule and petitioners' less efficient vessels. Petitioners may not like that competition, but this Court in *Seatrain* made clear that other vessels in the domestic fleet are not entitled to any special regulatory protection from competition by the VLCCs following CDS repayment.[29]

Finally, the statute does not even remotely impose a "mandatory" obligation upon MarAd to grant a request for operating subsidy, as petitioners seem to suggest. Rather, the first sentence of Section 1171(a) of the Act merely authorizes and directs the agency "*to consider*" applications for operating subsidies. Here, of course,

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[29] 444 U.S. at 589-90. As Judge Bazelon stated in his dissent in *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814, 843 (D.C. Cir. 1979), reversed in *Seatrain*:

> The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. *I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as [a] whole, to protect Jones Act operators from this type of competition.* (footnote omitted) (emphasis added).

MarAd has not failed to "consider" such applications, for none was filed.[30] Moreover, far from providing that operating subsidies *must* be granted in all circumstances where a subsidy would enable a vessel to compete in the foreign trade, the statute expressly provides that "[n]o such applications shall be approved . . . unless" the agency makes several critical determinations, including that the subsidy "is reasonably calculated to carry out effectively the purposes and policies of [the Act]."[31] As the court of appeals concluded, Pet. App 23a, the statutory framework is one that obviously accords MarAd substantial discretion in determining whether to award operating subsidies.[32]

Here, MarAd's articulated concerns were surely reasons that it could, in its discretion, properly consider in

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[30] The absence of such applications (and the absence of any authority to award operating subsidy without them) is not surprising. The Act imposes numerous restrictions on recipients of operating subsidies. Section 805(a) of the Act, 46 U.S.C. app. § 1223, for example, prohibits the payment of operating subsidy to an operator (such as respondent Atlantic Richfield Company) with any affiliate that operates vessels in the domestic trade without the Secretary's written permission. Requests for such permission are routinely opposed by existing domestic operators such as the present petitioners. *See, e.g., Puerto Rico Maritime Shipping Auth. v. Dole*, 619 F. Supp. 312 (D.D.C. 1985), *vacated as moot*, 825 F.2d 502 (D.C. Cir. 1987).

[31] 46 U.S.C. app. § 1171(a)(4). Section 1173(a) of the Act, which petitioners ignore, further provides that "[i]f the Secretary of Transportation approves the application, he *may* enter into a contract with the applicant for the payment of [operating subsidies]. . . ." (emphasis added).

[32] In the *Seatrain* case itself, this Court emphasized the Secretary's broad "discretion to administer the Act." 444 U.S. at 573; *see also United States Marine Int'l, Inc. v. Peterson*, 518 F.2d 1070, 1079 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976) (in operating subsidy determinations, agency "has broad discretionary authority to deal with the ever changing technological and economic conditions of the commercial shipping industry . . . ."). Petitioners cite no case authority for their erroneous assertion that the award of operating subsidy is mandatory.

concluding that massive operating subsidies would not be an appropriate alternative to the 1987 CDS payback rule. Petitioners' assertion that cost is always an improper consideration for MarAd (even when, in this era of federal budgetary constraints, the subsidy would amount to more than $20 million per year) is untenable; it is inconsistent with MarAd's obligation to ensure that no operating subsidy is awarded unless it is "reasonably calculated to effectively" accomplish the purposes of the Act. Determinations that such huge subsidies would eliminate incentives for efficient operation of vessels and might trigger counterproductive anti-competitive reactions by other nations (including subsidies for competing foreign-flag vessels that would directly undercut the very effectiveness of the operating subsidy itself) likewise fall well within the expert discretion of MarAd and the Secretary.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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